Office-Supreme Court, U.S.
FILED
JUL 6 1985
ALEXANDER L. STEVAS,
CLERK

(1)

85-137

CASE NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

HENRY LAVADO,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

LEON E. SHARPE, ESQUIRE
Leon E. Sharpe, P.A.
4770 Biscayne Blvd.
Suite 970
Miami, Florida 33137
Telephone: (305) 573-3823
May 29, 1985

Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the detention of Defendant Henry Lavado by local law enforcement officers for over an hour without conducting any interrogation or request for identification, while awaiting the arrival of federal drug enforcement agents amounted to an unlawful arrest; and whether the evidence and statements obtained following the arrival of the federal drug agents and the subsequent arrest of the Defendant were the fruit of an unlawful arrest.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America
Henry Lavado
Alexander Molina
Lee Roy Sawyer
Rafael Antonio Garcia-Andriany
Nicanor Curranza- Villa
Akejandro Ferreira- Rengifo
Orlando Valesquez- Silvia

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO PROCEEDING IN THE COURT BELOW.....	i i
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	v
JURISDICTION.....	vi
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	vi
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT.....	7

The decision below represents a departure by the Eleventh Circuit Court of Appeals from the mandate of the Fourth Amendment to the United States Constitution, and presents an important question of federal law regarding whether local law enforcement officers with only vague descriptions of the suspects, may detain a citizen for in excess of an hour while awaiting the arrival of federal drug agents, without requesting

information about his identity, placing him under arrest, or actively investigating the alleged crime.

E

CONCLUSION..... 29

CERTIFICATE OF SERVICE..... 30

APPENDIX.....

TABLE OF AUTHORITIES

PAGE

Adams v. Williams,
407 U.S. 143 (1972)..... 10,20

Dunaway v. New York
442 U.S. 200 (1979) 8,9,10,
14,17

Davis v. Mississippi,
394 U.S. 721 (1969) 12

Florida v. Royer
103 S. Ct. 1319 (1983) 15,17

Terry v. Ohio,
392 U.S. 1 (1968) 8,9,10,
11,13,
15

United States v. Allen,
629 F. 2d 51 (D.C. Cir. 1980) ..28

United States v. Blasco,
702 F. 2d 1315 (11th Cir. 1983).. 24

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 11,13,
23

United States v. Duckett,
550 F. 2d 1027 (5th Cir. 1977) ...26

United States v. Hensley,
105 S. Ct. 675 (1985) 21,22

United States v. Lumpkin,
448 F. 2d 1085 (D.C. Cir. 1971 ... 25

PAGE

United States v. Mendenhall,
446 U.S. 544 (1982) 13
United States v. Place,
103 S. Ct. 2637 (1983) 18

United States v. Sharpe,
105 S. Ct. 1568 (1985) 19

United States v. Sink,
586 F. 2d. 1041 (5th Cir. 1978) .25

United States v. Tyler,
505 F. 2d 1329 (5th Cir. 1975) ..25

Wong Sun v. United States,
371 U.S. 471 (1983) 28

STATUTES AND RULES
28 U.S.C. Section 1254 (1)
21 U.S.C. Section 955a (a)
21 U.S.C. Section 955a (c)

Rules of the Supreme Court of
the United States, Rule 20

OPINION BELOW

The opinion of the lower Court is appended hereto in its entirety.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's Conviction was entered on January 24, 1985.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C., Section 955a (a):

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute a controlled substance.

21 U.S.C., Section 955a (c):

It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

STATEMENT OF THE CASE

On August 27, 1982, while searching for a disabled vessel off the west coast of Florida, a United States Coast Guard vessel came upon a small boat alongside a larger vessel. (Tr. 181-182). As the Coast Guard approached, both the small boat and the larger boat fled. (Tr. 183). The Coast Guard pulled alongside the large boat that was heading towards the shore and ordered it to stop. (Tr. 183, 192).

The Coast Guard chased the larger vessel, the Barbara Ann, which eventually ran aground on Keewayden Island off of the west coast of Florida. (Tr. 197-199-201). Everyone on board the Barbara Ann then jumped off the boat and ran into the woods on Keewaydan Island. (Tr. 199-200).

The United States Customs service was called in to assist in the case. Carl Galente, a Special United States Customs agent, was called at his home in Miami, Florida at 11:45 P.M. on August 27th. He drove to the seizure site in the Naples, Florida area on Florida's west coast, arriving at 2:30 A.M. on August 28th. (Tr.23).

The Barbara Ann, was towed and later inventoried; it contained 28,000 pounds of marijuana on board. (Tr. 645). After an hour and an a half search, Collier County Police officers eventually apprehended four co-defendants. (Tr. 387- 389.)

On August 28, 1982, the Defendant and two other co-defendants flagged down a civilian near Keewaydan Island. (Tr.449). The civilian took the Defendant to the Rookery Bay Laboratory in Naples, Florida.

(Tr. 455-458). When the Defendant arrived at the laboratory, the director of the marine laboratory called the Collier County Sheriff's Department who arrived at the laboratory within fifteen minutes. (Tr. 458, 464). The Defendant, along with two co-defendants, was then ordered by the Collier County Sheriffs to sit against the wall on the outside of a laboratory building while three uniformed and gun-carrying Collier County Deputy Sheriffs stood within fifteen to twenty feet of the Defendant. In addition, a marine officer had blocked the boat exit so that Defendant could not take a boat from the Rookery. (Tr. 466). It is undisputed that the Collier County Deputy Sheriffs were detaining the Defendant and that the Defendant was not free to leave. (Tr. 465- 466, 503,571).

During his supervision of the unloading of the Barbara Ann, at 10:45 A.M. on August 28th, Galente received a call from the Collier County Sheriff that they were detaining three men at the Rookery Bay laboratory (Tr. 45, 502-503).

Over one hour later, special agent Galente arrived at the laboratory and proceeded to individually question each of the Defendants. At this time, the only description that Galente had of the men at large was of three American males, either one or two Hispanic, one had blond hair, one had brown curly hair and one had black hair. Two of the men were in there twenties and the other in his 40's (Tr.25). Galente did not know their heights, weight, bodysize, facial hairs, or clothing (Tr 65-66).

Upon first encountering the Defendant

at the rookery, the customs agents identtified themselves, read the Defendant his "Miranda" rights and then asked the Defendant for some identification. (Tr. 504). Agent Galente testified that Defendant Lavado handed over his wallet to another customs agent in response to a request for identification. (Tr. 507). At no time did the Defendant indicate that he either understood or waived his constitutional rights.

The customs agent proceeded to sort through the wallet, finding inculpatory evidence linking Defendant to the Barbara Ann. (Tr 507-541). The items seized from the wallet were Government exhibts at trial.

Defendant filed a motion to suppress on the following bases: (1) the detention by the Collier County Police

Department which exceeded an hour was an arrest without probable cause, (2) that the customs agent, Galente's "arrest" of Defendant was without probable cause, (3) that Defendant did not knowingly and intelligently waive his constitutional rights to an attorney and to remain silent, and (4) that all of the evidence in this case, especially that obtained from Defendant's wallet was illegally seized. (Tr. 141-152).

The motion to suppress was denied. (Tr. 156) The motion to suppress was renewed at trial on several occasions as the matters came up during trial. (Tr. 276, 530-536). These motions were also denied. (Tr. 276,536).

REASON FOR GRANTING THE WRIT

The decision below represents a departure by the Eleventh Circuit Court of Appeals from the mandates of the Fourth Amendment to the United States Constitution, and presents an important question of Federal law regarding whether local law enforcement officers with only vague descriptions of the suspects, may detain a citizen, for in excess of an hour while awaiting the arrival of federal drug agents, without requesting information about his identity, placing him under arrest, or actively investigating the alleged crime.

The decision of the Eleventh Circuit Court of Appeals affirming the Petitioner's conviction of possession and importation of a controlled substance is based upon evidence obtained from an illegal arrest of the Petitioner in violation of his Fourth Amendment right to be free

from unreasonable searches and seizures. For all intents and purposes, the Court's decision allows local law enforcement officers to detain citizens indefinitely, without conducting any investigatory questioning until federal drug enforcement agents arrive to conduct the interview.

Before Terry v. Ohio, 392 U.S.1 (1968), the Fourth Amendment guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based upon probable cause. The standard applied to all arrests, without the need to balance the interests of law enforcement and the rights of an individual to the possession and control of his own person, free from interference of others, unless by clear and unquestionable authority of law. Duna-

way v. New York, 442 U.S. 200,208 (1979).

Terry for the first time recognized an exception to the long standing requirement that all Fourth Amendment seizures must be based on probable cause. The Court in Terry recognized "that a police officer may in approporiate circumstances and in appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest". Terry, 342 U.S. at 22. The Court expressly limited the exception to the probable cause requirement by describing the policeman's right to search for weapons as a "narrowly drawn authority". Terry, 392 U.S. at 27.

The Court in Dunaway re-emphasized the limited nature of the Terry exception to the probable cause requirement of the

Fourth Amendment. Dunaway, 442 U.S. at 210. The rationale behind the Terry exception is that the investigatory stop is so substantially less intrusive than an arrest for which the general rule requires probable cause, that such a stop does not violate a citizen's Fourth Amendment rights. Terry v. Ohio, 392 U.S. 1, 22 (1968); Dunaway v. New York, 442 U.S. 200, 210 (1979).

In Adams v. Williams, 407 U.S. 143, 145 (1972), the Court elaborated on Terry stating that:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recoginzes that it may be the essence of good police work to adopt an intermediate response... A brief stop of a suspicious individual, in order to determine his iden-

tity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts know to the officer at the time. Id at 145-146 (citations omitted, emphasis added).

Moreover, it is apodictic that a Terry stop that is valid at its inception may become unduly intrusive on personal liberty and therefore violate the individuals Fourth Amendment rights. As noted in Terry, "this Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Id at 18. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975) the Court reviewed the Terry exception in the context of roving border patrols stopping automobiles to check for illegal immigrants. The Court held that:

> "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly, and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation'. 392 U.S. at 29, 88 S. Ct. at 1884. The officer may question the driver and passengers about their citizenship, and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." Id. at 881.

It is clear that the Fourth Amendment applies to all seizures of the person, including those Terry stops that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, (1969). However, because of the limited nature of investigative stops, the Court has developed a different standard for evaluating the reasonableness of

an investigative stop. The Court in Terry developed a dual inquiry wherein it would examine: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20. As to the first part of the inquiry, the officer must have an articulable and reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968) United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

In discussing what constitutes a Fourth Amendment seizure, the United States Supreme Court observed in United States v. Mendenhall, 446 U.S. 544 (1980):

> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only

> if,in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id. at 554, (Citation omitted).

Similarly, in Dunaway v. New York, 442 U.S. 200 (1979), the Court declared that if a defendant "was never informed that he was 'free to go'", or if the defendant "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody," then an arrest of the defendant had taken

place and this arrest must have been supported by probable cause. Id. at 212. See also, Florida v. Royer, 103 S. Ct. 1319 (1983). In Terry, the Court provided that "it must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. Id. at 16."

In the instant case, it is without question that Henry Lavado was under arrest while he was being held by the three uniformed Collier County Deputy Sheriffs at the Rookery Bay Marine Laboratory in Naples, Florida, and this was not simply an investigatory stop. The testimony at trial indicated that the Defendant, along with two co-defendants, were compelled to sit against a wall at the laboratory, with at least three gun-bearing uniformed Collier County

Deputy Sheriffs surrounding them approximately ten to fifteen feet away. (Tr. 46-47, 100). In addition, a marine officer had blocked the boat exit so that Defendant could not take a boat from the Rookery. (Tr. 466). The testimony at trial leaves no doubt that at this point in time, the Defendant was detained and not free to leave. (Tr. 45, 96, 99-100, 503). Indeed, one of the Government's witnesses, Carl Galante, a special agent with the United States Customs Service, admitted on direct examination that the Defendant was "being detained there by the Collier County Sheriff's Department" prior to Agent Galente's arrival at the laboratory. (Tr. 503). When Special Agent Galante arrived at the Rookery Bay Marine Laboratory, Defendant and the two co-defendants had been detained for over an

hour. (Tr. 73, 99). It is obvious then, that at this point in time, the Defendant was already under arrest and to be legal, this arrest would have to have been supported by probable cause. Dunaway v. New York, supra; Florida v. Royer, supra.

Assuming arguendo that the Collier County Sheriff's department had an articulable and reasonable suspicion to make a Terry stop on the Defendant. The fact that the Defendant was detained for over an hour while awaiting the arrival of drug agents who were only 30 minutes away, raised the detention to the level of an arrest requiring either consent or probable cause.

This Court in Florida v.Royer, 103 S. Ct. 1319 (1983), made it clear that:

> "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarily, the investigative methods employed should be the least intrusive means resonably available to verify or dispel the officer's suspicion in a short period of time." Id. at 1325.

In rejecting the government's contention that a ninety (90) minute seizure of defendant's luggage was a reasonable Terry stop, the Court in United States v. Place, 103 S.Ct. 2637 (1983) provided that:

> "The length of the detention of respondent's luggage alone precluded the conclusion that the seizure was reasonable in the absence of probable cause....the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." Id. at 2645.

See also, United States v. Sharpe, 105 S. Ct. 1568 (1985).

In the instant case, the detention was clearly not brief. The Collier County Sheriff's Department was advised of the Defendant's presence at the rookery by the director of the laboratory. The Sheriff's officers arrived within 15 minutes. (Tr. 464). Upon receiving the call, the Sheriff's Department called the federal drug agents who were some thirty minutes away. (Tr. 26). Yet, it was over an hour before Special Agent Galente arrived at the rookery. Therefore, from the time that the director at the rookery made his call, the federal agents took over an hour and fifteen minutes (75 minutes) to make a 30 minute trip.The lengthy delay indicates

a total lack of diligence by law enforcement personnel. When he received the call, Agent Galente was merely witnessing the off-loading of a vessel carrying a controlled substance. (Tr. 502).

Moreover, the detention was too long in duration to be justified as an investigative stop because both the Sheriff's department and the DEA agents failed to act diligently in their investigation. The purpose of the limited investigative Terry stop" is not to discover evidence of crime, but to allow the officer to pursue his investigation." Adams v. Williams, 407 U.S. at 146.

The lack of diligence and delay in the instant case is undoubtedly attributable to the fact that Agent Galente thought that the other men from the Barbara Ann would not be found. Here, the Collier

County Sheriffs violated the mandates of Terry, Adams, Place , and Sharpe by failing to conduct any investigation whatsoever. They simply detained Defendants for in excess of an hour while awaiting the arrival of special drug agents. Given the purposes of investigative detentions, the Sheriffs' conduct in simply holding the Defendant without conducting any investigation whatsoever constitutes a clear unreasonable seizure under the Fourth Amendment.

In United States v. Hensley, 105 S. Ct. 675 (1985), involving a defendant who was picked up by a police department in another location on a "wanted flyer" issued by the first police department where the crime occurred, this Court suggested that it may be a violation of an individual's Fourth Amendment rights for a

distant police department to hold an individual simply for questioning because of the possible length of the detention. The Court stated:

> "Given the distance involved and the time required to identify and communicate with the department that issued the flyer, such a detention might well be so lengthy or intrusive as to exceed the permissible limits of a Terry stop." Id. at 684.

However, because the length of the defendant's detention in Hensley from the point of the Terry stop to his arrrest on probable cause was brief, the Court did not have an opportunity to determine the ultimate issue presented in the case at bar, to wit, assuming arguendo that the initial detention of Defendant Lavado was valid, did the subsequent lengthy deten-

tion, without conducting any investigation, render the detention so intrusive as to exceed the permissible limits of a Terry stop. A review of the decisions of this Court leads to the inevitiable conclusion that the lengthy detention in this case was so intrusive so as to be indistinguishable from a traditional arrest, requiring probable cause or a warrant. See, United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

Moreover, it is likewise readily apparent that the seizure in the case at bar cannot meet the probable cause requirement of the Fourth Amendment. At the time the Defendant Lavado was placed under arrest and detained by the Collier

County Deputy Sheriffs, there was no probable cause to believe the Defendant was committing or had committed an offense. In its recent decision of United States v. Blasco, 702 F. 2d 1315 (11th Cir. 1983), this Court declared:

> "Probable cause to arrest exits where the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonable trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed". Id. at 1324 (citation omitted).

In the case at bar, the Collier County Deputy Sheriffs who had the Defendant under arrest clearly did not have probable cause to believe that the Defendant committed the offenses of which he was eventually convicted, i.e., possession with intent to distribute marijuana and/or

conspiracy to possess with intent to distribute marijuana. With respect to the offense of possession with intent to distribute, there is no question that association alone is insufficient to link one to a criminal act. United States v. Sink, 586 F. 2d 1041 (5th Cir. 1978); United States v. Tyler, 505 F. 2d 1329 (5th Cir. 1975).

What was required to justify the arrest of the Defendant was evidence that the Defendant knowingly associated himself in some way with a criminal venture, that he participated in it as something that he wished to bring about, and that he sought, by his actions, to make it succeed. United States v. Lumpkin, 448 F. 2d 1085 (D.C. Cir. 1971). In the instant case, neither the local Sheriffs who were detaining the Defendant, nor the DEA

agents who formally arrested Defendant had probable cause or reasonable suspicion to believe that the Defendant had committed the offense of possession of narcotics with intent to distribute or any other crime.

Similarly, the detaining officers had no probable cause to believe that the Defendant had committed the offense of conspiracy to possess marijuana with intent to distribute it. In United States v. Duckett, 550 F. 2d 1027 (5th Cir. 1977), the court articulated the elements of the crime of conspiracy and indicated there must be a showing that a conspiracy existed, that the defendants knew of the conspiracy and with that knowledge intentionally did some act or thing to further or carry on that conspiracy. Id at 1030.

The only knowledge that the Collier

County Sheriffs could arguably be said to have possessed at that time that they detained Defendant , was that a vessel had been seized by the United States Customs Service and that four people were apprehended and three people were at large. (Tr. 23). In addition, the authorities at that time had a vague description of the three individuals which amounted to three males, one or two of whom were Hispanic, two in their early twenties and one in his forties, one having blonde hair, one brown curly hair, and one black hair. (Tr. 25).

More importantly, neither during the motion to suppress hearing nor the trial itself, did the Government present any direct testimony from the detaining Collier County Deputy Sheriffs which would indicate exactly what knowledge these officers had with respect to the

Defendant's possible involvement in crimes or with respect to the descriptions given to them of the three suspects who were at large. The burden of proving the legality of a challenged warrantless arrest rests heavily upon the Government. United States v. Allen, 629 F. 2d 51 (D.C. Cir. 1980). In the case at bar the Government has not met that burden.

Since the arrest of the Defendant was not supported by probable cause, the arrest was illegal and the post-arrest statements and physical evidence obtained from the Defendant's wallet by the federal drug agents which directly flowed from that illegal arrest by the Collier County Sheriffs and which were inculpatory in nature, (Tr. 503-522, 537-542), should have been suppressed as fruits of illegal police activity. Wong Sun V. United States, 371 U.S. 471 (1963).

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals in this case is in irreconcilable conflict with the long established dictates of the Fourth Amendment to the United States Constitution. To permit local law enforcement officers to detain individuals indefinitely, without probable cause to arrrest them or without conducting any investigatory questioning, represents a clear violation of Henry Lavado's constitutional rights. Certiorari should be granted to remedy the injustice created in this case and to end the assault on the individual freedoms guaranteed by the Fourth Amendment.

Leon E. Sharpe, P.A.
4770 Biscayne Blvd.
Suite 970
Miami, Florida

By Leon E. Sharpe
LEON E. SHARPE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition have been served by United States Mail this 28th day of June, 1985, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W. Washington, D.C., 20530, and a copy upon William Harris, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

Leon E. Sharpe

LEON E. SHARPE, ESQUIRE

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee.

v.

Henry LAVADO, Jr., Rafael Antonio Garcia-Andriany, Lee Roy Sawyer, Alexander Molina, Nicanor Carranza-Villa, Allejandro Ferreira-Rengifo, Orlando Velasquez-Silva, Defendants-Appellants.

No. 83-5285.

United States Court of Appeals,
Eleventh Circuit.

Jan. 24, 1985.

Defendants, three Americans and four Colombians, were convicted before the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., of conspiracy to possess with intent to distribute marijuana while on board a vessel subject to jurisdiction of the United States and possession with intent to distribute marijuana. They

appealed. The Court of Appeals, Godbold, Chief Judge, held that: (1) evidence concerning tracking dog was not erroneously admitted; (2) jury was entitled to accept dog trainer's testimony that sniffing of suspects was dog's way of identifying subjects of track; (3) evidence, including tracking dog's track from beaching point of abandoned boat containing marijuana to location of the Colombian defendants, was sufficient to sustain their convictions; (4) brief detention by local officers of American defendants at the border, or its functional equivalent, for purpose of awaiting arrival of customs officers was valid; and (5) there was no error in introducing material from one defendant's wallet, since he handed over his wallet in response to a request to identify himself, and there was no evidence of duress or

coercion other than fact of detention to make his facially voluntary act involuntary.

Affirmed.

1. Criminal Law - 386

Evidence concerning tracking dog was not erroneously admitted in prosecution for conspiracy to possess with intent to distribute marijuana, where dog trainer testified to his experience in training and using tracking dogs, extending over nearly ten years, and he explained methodology for training and testified to prior experience with dog and to her reliability.

2. Criminal Law - 553

Jury was entitled to accept dog trainer's testimony that dog's sniffing of suspects was her way of identifying subjects of track.

3. Conspiracy - 47(12)

Drugs and Narcotics - 123(2)

Evidence in prosecution for conspiracy to possess with intent to distribute marijuana and possession with intent to distribute, including track by tracking dog from point where abandoned boat containing marijuana was beached to location where defendants were apprehended, was sufficient to sustain convictions. 21 U.S.C.A. § 955a(a, c).

4. Criminal Law - 1169.1(2)

It was not unduly prejudicial to identify group of defendants in prosecution for conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana as "Colombians," since one of the group identified them as such, and there was evidence from which jury could infer that

abandoned boat containing marijuana had been to Colombia.

5. Arrest - 63.5(3, 9)

A Terry-type stop, at the border, by local officers, followed by a brief detention, for purpose of awaiting arrival of officers with border-type authority is valid; length of time that noncustoms officers can maintain status quo at the border or its functional equivalent, awaiting arrival of persons with customs authority, must be brief.

6. Arrest - 63.5(9)

Detention of defendants for one hour at the border, or its functional equivalent, by local officers who had no customs authority, to permit arrival of customs officers, was valid, particularly in view of the remoteness of the area.

7. Criminal Law - 404(1)

Where, after defendant had been given Miranda warnings, he handed over his wallet in response to a request to identify himself, and there was no evidence of duress or coercion other than fact of detention to make his facially voluntary act involuntary, there was no error in introducing material from his wallet.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and PECK*, Senior Circuit Judge.

GODBOLD, Chief Judge:

Defendants are a group of three

---

*Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Americans and four Colombians convicted of conspiracy to possess with intent to distribute marijuana while on board a vessel subject to the jurisdiction of the United States[1] and possession with intent to distribute marijuana.[2] All the convictions are affirmed.

FACTS

A Coast Guard cutter was searching for a disabled small boat off the west coast of south Florida. It came upon a small and large boat together, approached them, and both fled. The cutter followed the larger boat, pulled alongside, and attempted to get it to stop. The cutter crew observed persons scrambling around in the cabin and a chart thrown out of the

---

1. 21 U.S.C. § 955a(c).
2. 21 U.S.C. § 955a(a).

cabin window. The cutter stopped, retrieved the chart, and detected the odor of marijuana from it. The cutter resumed the chase and succeeded in stopping the boat after displaying a weapon. The crew heard Spanish being spoken on the boat and saw seven people aboard. Three were later recognized as the American defendants. While the two vessels were stopped they were 15 to 20 feet apart, in calm waters and during daylight hours. The odor of marijuana could be detected emanating from the boat.

The apparent skipper of the boat demanded that the Coast Guard board or he would leave. After some argument the boat took off, with the cutter in pursuit, in the direction of Marco Island. The chase continued into the night. Finally the boat ran aground on Keewayden Island, and

all of its crew jumped off and ran into nearby woods. The Coast Guard boarded the boat and found no one aboard but found 128 bales of marijuana. Among items found aboard were postcards, a newspaper from Barranquilla, Colombia, and a business card with the name Henry Lavado on it. The name "Barbara Ann" was affixed to the boat by a sign; underneath the sign was the name, "Yenya." A vessel named Yenya had been boarded about a month earlier by the Coast Guard in the passage between Haiti and Cuba. One of the persons aboard had identified himself as Henry Lavado and stated that he was the operator of the boat.

The Coast Guard notified the county sheriff's office and the Florida Marine Patrol of the circum ances of the chase and the beaching of the boat. A search

commenced on Keewayden Island at about 10:00 to 10:30 p.m. The island is in a remote area, but there are about ten week-end cottages located on it and one private club with cottages. About an hour and a half after the search began an officer saw persons running and shot over their heads; three persons dropped to the sand. When the officer identified himself one of the group responded "Colombians." After the three were taken to a patrol boat one of the three shouted something in Spanish and gestured toward the beach. An officer shined a light on the beach and spotted another person, who was apprehended. A tracking bloodhound, Jessie, and her trainer had been following a trail to the area where the suspects were apprehended. When Jessie was placed aboard the patrol boat she went up to the four suspects and

sniffed them. This was her way of indicating the source of a scent or scents she had been following. She sniffed no one else on the boat.

The following morning, at about 10:00 a.m., a biologist was at work in a remote wildlife area two miles from Keewayden Island. He ran into three men coming out of the bush. They were wearing stained tee shirts and shorts, had no camping gear or provisions, and were bug-bitten and scratched. They told him that they had left their boat near Cape Romano, which is 20 miles from the place where they encountered the biologist. Based on his experience the biologist knew that it was not possible to travel overnight from Cape Romano to where they were without using a boat.

The three men inquired how they could

get out of the area. The biologist offered to take them out. He transported the three to a marine laboratory, where Lavado used the telephone to give directions to a person in Key West, describing how to get to the laboratory, a five hour trip. The biologist informed the director of the laboratory of what had happened, and the sheriff's department was called. Three officers from the sheriff's office arrived. They detained the three men to wait the arrival of customs officials, but they did not place them under formal arrest.

Customs officers arrived after approximately one hour. An officer identified himself to Lavado, gave him Miranda warnings, and advised him that he was the subject of an investigation. He requested Lavado identify himself. Lavado brought

out his wallet and handed it over. It contained a Coast Guard record showing Lavado as operator of the Yenya, receipts for diesel fuel procured in Barranquilla, Colombia, and Port au Prince, Haiti, and a piece of a navigation chart later identified as matching a larger portion found aboard the Yenya.

THE COLOMBIANS

[1] The evidence concerning Jessie, the tracking dog, was not erroneously admitted. U.S. v. Joyner, 492 F.2d 650 (D.C.Cir.) cert. denied 419 U.S. 852, 95 S.Ct. 94, 42 L.Ed.2d 83 (1974); U.S. v. Guerrera, 554 F.2d 987 (9th Cir. 1977). The trainer testified to his own experience in training and using tracking dogs, extending over nearly ten years. He explained the methodology for training and testified to prior experience with Jessie

and to her reliability. He testified that Jessie began tracking at the site where four sets of footprints going in the same direction left a life jacket lying on the beach. Other footprints left the area of the life jacket and went in another direction. The life jacket was identified to him as having been removed from the beached boat (which was no longer there), and as marking the location where the occupants of the boat had left the boat. Another witness placed the beaching point at another location, but the jury could accept the trainer's location as correct.

[2] Jessie did not run the Colombians down but sniffed them after they had been arrested. The jury was entitled to accept the trainer's testimony that this was her way of identifying the subject of the track.

[3] This case differs from U.S. v. Rozen, 600 F.2d 494 (5th Cir. 1979). There defendant was charged with possession of and conspiracy to possess marijuana. The only evidence to connect him with the conspiracy, and with a truck found in the woods and carrying marijuana, was a track by bloodhound Clyde, who "cut a tight circle" around the truck, found a scent, and followed it, and some three to four miles away through the woods and some five hours later, found defendant asleep in the woods. We held that the evidence was insufficient to convict because the scent was picked up at an unspecified point near the truck and could not support an inference that defendant had been in the truck or in a position where he could see marijuana within the truck's body. In the present case the nexus between

beaching point, jacket from the boat, four sets of prints, four persons arrested and sniffed by Jessie, identification of the four as Colombians, and nexus of the boat to Colombia, sufficiently connected defendants to the scent and to the boat.[3]

The evidence was sufficient as to the

---

3. Counsel, having picked up from other cases the scent of how to handle a tracking dog case, followed numerous leads relating to testimony about Jessie's track-Jessie's training, the experience and qualifications of her trainer, prior cases in which she had "testified" through the surrogate voice of her trainer, whether Jessie led the trainer along the scent and the footprints or he led her, whether Jessie was truly a bloodhound or only a mutt (her pedigree not being in evidence), whether she swam to the boat where she sniffed defendants or was taken to it and hoisted aboard, and whether defendants were entitled to have Jessie present in court. Presumably Jessie was still alive, so she escaped the issue raised in Rozen, of whether testimony concerning Clyde, who pending trial had passed away to happier hunting grounds, was barred under principles barring testimony concerning a transaction with a dead dog.

Colombians, bearing in mind their presence on the remote island late at night, that Spanish was heard from the boat, the spontaneous identification of the group by one of them as Colombians, the items on the vessel tending to show that it had been to Colombia, the four-three combination of Colombians and the Americans that the jury could infer made up the seven persons from the boat, and the dog trainer's testimony.

[4] The contention of these defendants that it was unduly prejudicial to identify them as "Colombians" is frivolous. One of the group identified them as such, and there was evidence from which the jury could infer that the boat had been to Colombia.

THE AMERICANS

The three Americans contend they were illegally detained at the marine labora-

tory by the county officers, so that their subsequent arrests by customs officers approximately an hour later were invalid and evidence obtained from them and statements made by them to customs officers were therefore inadmissible.

The county officers did not have probable cause. The most they knew was that a vessel had been chased and had been seized by the Coast Guard in the vicinity and that three males were at large. But the officers did have reasonable suspicion, based upon the foregoing information, the remoteness of the area, the unlikelihood that three males would be tramping around together lost, clothed as they were, and seeking transportation out of the area.

[5,6] This was more than a Terry investigatory stop. The county officers did not investigate. Rather they detained

the defendants for an hour awaiting the arrival of the customs officers. The detention occurred at the border, or the functional equivalent, but was by local officers who had no customs authority. We agree with the Ninth Circuit that a Terry-type stop, at the border, by local officers, followed by a brief detention, for the purpose of awaiting the arrival of officers with border-type authority, is valid. U.S. v. Moore, 638 F.2d 1171 (9th Cir. 1980). The length of time that non-customs officers can maintain the status quo at the border or its functional equivalent, awaiting the arrival of persons with customs authority, must be brief. Bearing in mind the location, the one-hour detention in this case passes muster.

[7] There was no error in introducing

the material from Lavado's wallet. After he had been given Miranda warnings, he handed over his wallet in response to a request to identify himself. There is no evidence of duress or coercion other than the fact of detention to make his facially voluntary act involuntary.

The contention of the Americans that the evidence as to them was insufficient is frivolous. We do not need to repeat the analysis made above with respect to the Colombians, because the Americans were identified as three of the persons on the boat.

AFFIRMED.

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-137

In the Supreme Court of the United States

OCTOBER TERM, 1985

HENRY LAVADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the evidence seized from petitioner should be suppressed on the ground that his detention by local officers pending the arrival of Customs officials constituted an illegal arrest.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

INS v. *Delgado*, No. 82-1271 (Apr. 17, 1984)	8
Michigan v. *Summers*, 452 U.S. 692	6, 7
Segura v. *United States*, No. 82-5298 (July 5, 1984)	8
Stone v. *Powell*, 428 U.S. 465	5
United States v. *Crews*, 445 U.S. 463	8
United States v. *Montoya*, No. 84-755 (July 1, 1985)	7
United States v. *Moore*, 638 F.2d 1171, cert. denied, 449 U.S. 1113	6
United States v. *O'Looney*, 544 F.2d 385, cert. denied, 429 U.S. 1023	6
United States v. *Place*, 462 U.S. 696	6
United States v. *Sharpe*, No. 83-529 (Mar. 20, 1985)	6, 8

Constitution and statutes:

U.S. Const. Amend. IV	5, 7
21 U.S.C. 955a(a)	2
21 U.S.C. 955a(c)	2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-137

HENRY LAVADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 750 F.2d 1527.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1985. The petition for a writ of certiorari was filed on July 6, 1985, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. See Point 1, *infra*, page 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress, petitioner was convicted at a jury trial in the United States District Court for the Southern District of Florida of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 955a(c), and of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 955a(a).[1] He was sentenced to consecutive terms of five years' imprisonment on each count and to a special parole term of two years. The court of appeals affirmed.

1. The evidence adduced at the suppression hearing and at trial showed that, on the afternoon of August 27, 1982, two boats fled when approached by a Coast Guard cutter along the west coast of South Florida. The cutter eventually stopped the larger boat and found seven persons on board, including petitioner. After some discussion, the boat again fled with the Coast Guard in pursuit. The boat eventually beached on Keewayden Island, where the entire crew jumped ship and ran into the woods. The Coast Guard boarded the boat and found 128 bales of marijuana. Pet. App. A7-A9.

The Coast Guard notified the County Sheriff's Office and the Florida Marine Patrol of these events, and a search for the crew was commenced. About an hour and a half after the search began, the search team apprehended three individuals fleeing down the beach; when an officer identified himself, one of the three men responded "Colombians." Shortly thereafter, the search team apprehended a fourth individual to whom

---

[1] Petitioner's co-defendants—Lee Roy Sawyer, Alexander Molina, Orlando Velasquez-Silva, Nicanor Carranza-Villa, Rafael Antono Garcia-Andriany and Alejandro Ferreira-Rengifo—were all convicted on the same charges.

one of the three suspects was shouting and signalling. Subsequently, a tracking bloodhound, who had been following a trail to where the suspects were apprehended, alerted to the four suspects. Pet. App. A9-A11; Tr. 379-397. The County Sheriff's office informed the Coast Guard that they had found four suspects in Keewayden Island; at that time, a Coast Guard officer who had seen all the crew members on the boat gave the County Sheriff's office a full description of petitioner and the other two suspects who had not yet been apprehended (Tr. 69-71, 235-236, 258).

At about 10:00 a.m. the following morning, a biologist at work in a remote wildlife area two miles from Keewayden Island came upon petitioner and the other two missing crew members who had jumped ship with him. The three men were wearing stained T-shirts and shorts, had no camping gear or provisions, and were bug-bitten, scratched, and wet. Petitioner told the biologist that they had left their boat near Cape Romano, which was 20 miles from their present location, and had wandered away from the boat and gotten lost. The biologist, who was familiar with the area, knew that it was not possible to travel overnight from Cape Romano to where they were without using a boat. Pet. App. A11.

Petitioner asked the biologist how they could get out of the area, and the biologist offered them a ride. He drove them to a marine laboratory six miles away, where petitioner telephoned a woman in Key West, Florida, and arranged for someone to make the five-hour drive from Key West to the marine laboratory to pick them up. The biologist informed the director of the laboratory of what had happened, and the director in turn telephoned the County Sheriff's Department. Pet. App. A11-A12; Tr. 456-458. The

Sheriff's Department sent three officers to the marine laboratory to detain the suspects and notified the Customs Service that it believed that the three missing men had been found (Tr. 25-26, 458-460, 464, 502-503).

Within 15 minutes, three armed, uniformed officers from the Sheriff's Department arrived at the laboratory, where they detained the three men for 30 to 60 minutes pending the arrival of the Customs officials (Tr. 25-26, 45-46, 72-73, 113, 123-125). The officers did not question or formally arrest the three suspects, but merely informed them that they were to wait for Customs officials to arrive (Tr. 26, 127). When the Customs officers arrived at the laboratory they identified themselves to petitioner, advised him of his *Miranda* rights, and told him that he was the subject of an investigation (Tr. 26-27). When asked to identify himself, petitioner gave his wallet to one of the officers (Tr. 27). The wallet contained identification showing petitioner to be Henry Lavado; papers identifying him as the operator of the boat; receipts for diesel fuel procured in Colombia and Haiti; and a piece of navigation chart later identified as matching a larger portion found aboard the boat. Pet. App. A12-A13.

2. The court of appeals affirmed (Pet. App. A1-A20) the district court's denial of petitioner's motion to suppress. The court found that the local officers had reasonable suspicion to believe that petitioner and his two companions were the crew members being sought by the Coast Guard. The court also found that the detention of petitioner and his companions had occurred at the functional equivalent of the border; hence, the local officers had acted properly in detaining the suspects while awaiting the arrival of

Customs officials. Given the location at which the detention occurred, the court held, the one-hour detention was not unreasonable. *Id.* at A18-A19.

ARGUMENT

1. At the outset, we submit that the Court should not accept this case for review because of the substantial untimeliness of the petition. The judgment of the court of appeals was entered on January 24, 1985, and the petition therefore was due for filing on March 25, 1985. It was not filed until July 6, 1985, and therefore was more than three months out of time. The sole issue presented in the petition concerns whether the district court erred in denying petitioner's motion to suppress. Since this contention has no bearing upon the issue of guilt or innocence, we submit that the Court should not consider it when presented in a petition that is so far out of time. To entertain this contention now, when the judgment of conviction has long since become final, would circumvent the policies restricting collateral attacks upon final judgments on the basis of Fourth Amendment exclusionary rule claims. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

2. While we believe that the preceding point should be dispositive of this petition, we will briefly discuss the reasons why the court of appeals' rejection of petitioner's contention (Pet. 7-29) that he was illegally arrested when the local officials detained him pending the arrival of Customs officials was correct and not worthy of further review.

a. The court of appeals correctly held that the detention here did not exceed the lawful bounds of an investigative stop. It is undisputed that the local officers had, at a minimum, reasonable suspicion to believe that petitioner and his companions were the

three missing drug smugglers. Clearly, however, the appropriate officials to investigate and confirm that suspicion were the Customs officers who were familiar with the crime and had previously seen the crew of the boat. Contrary to petitioner's assertion (Pet. 20-21), holding a suspect until more knowledgeable officers can arrive is a legitimate ground for an investigative detention, provided it is not unduly prolonged, even if the detaining officers do not themselves conduct any investigation. See *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 12 & n.5; *United States* v. *Moore*, 638 F.2d 1171, 1173-1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976).

The gist of petitioner's contention appears to be that the length of the detention here necessarily converted it into an arrest (see Pet. 17-23).[2] This is simply not so. The Court has repeatedly declined to set a specific temporal limitation on the length of an investigative stop; rather the question that must be resolved in each particular factual situation is whether the police are diligently pursuing a means of investigation that is likely to resolve the matter in a reasonable period of time. See *United States* v. *Sharpe*, slip op. 9, 11; *United States* v. *Place*, 462 U.S. 696, 709 (1983); *Michigan* v. *Summers*, 452 U.S. 692, 701 n.14 (1981). The investigation here

---

[2] The exact length of the detention is uncertain, but it is clear that it lasted no more than one hour. Petitioner testified (Tr. 99) that it was one hour. One of his companions testified that the detention lasted 30 minutes (Tr. 113); the other testified that it lasted 30-45 minutes (Tr. 125). Customs Agent Galante testified that he believed the suspects had been detained for between 30 and 60 minutes (Tr. 72-73).

was diligent. It was reasonable for the local officials to wait for the arrival of Customs agents; those agents were summoned immediately and arrived within the hour. In these circumstances, the court of appeals correctly reached the factbound conclusion that "the one-hour detention in this case passes muster" (Pet. App. A19).[3]

b. The conclusion that a detention of up to one-hour in this case did not violate the Fourth Amendment is strengthened when one considers that, on the facts here, the detention was only a minimal intrusion into petitioner's liberty. In *Michigan* v. *Summers*, the Court noted that the detention there was not particularly intrusive given that the detainees likely would have chosen voluntarily to remain to observe the search of their possessions. 452 U.S. at 701. By the same token, it is undisputed that petitioner's plan—if he had never been detained by the local police officers—was to wait at the laboratory for five hours for his ride to arrive from Key West. Thus, while the officers technically did detain peti-

---

[3] The court of appeals found that petitioner was detained at the functional equivalent of the border (Pet. App. A19). Had he entered the country through lawful channels, of course, petitioner would have been subject to detention by Customs officers for as long as necessary (see *United States* v. *Montoya*, No. 84-755 (July 1, 1985)) and, indeed, to a search by those officers. A long line at the Customs desk is not a Fourth Amendment violation. One who is in the process of attempting to evade the Customs Service by entering the country illegally should not be considered to have a legitimate expectation of being free from such a search or detention that could be performed at a border entry point. Even petitioner's own story to the biologist indicated that he had made a recent uninspected entry into the United States. Under the circumstances, petitioner had no right to be free from a Customs inspection.

tioner by restricting his freedom to leave, the fact is that he had no intention of leaving anyway, and therefore the detention was not, as a practical matter, a significant intrusion. See *INS* v. *Delgado*, No. 82-1271 (Apr. 17, 1984), slip op. 7.

Indeed, because petitioner had no plans to leave the laboratory for five hours, it is apparent that the seized evidence could not be the "fruit" of an illegal detention. If the detention had never occurred, petitioner still would have been at the laboratory when the Customs agents appeared, and they would have conducted the investigation and discovered the evidence. There is simply no causal connection here between the actions of the local officers, even if illegal, and the discovery of the evidence. See generally *United States* v. *Sharpe*, slip op. 7; *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 19; *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

c. In any event, although the court of appeals did not so find, we think it clear that the local officers had probable cause to arrest petitioner when they arrived at the laboratory and detained him. The three men had been discovered near the spot where the boat had gone ashore the night before. The biologist who found them knew that their story of how they came to be there was false. And they matched a description given by the Coast Guard of the three crew members who were still missing.[4]

[4] The Coast Guard described the missing suspects as: a 5'7" to 5'8" male with black hair worn close to the neck and a bushy moustache, weighing 160-170 pounds and wearing short jeans and no shirt; a blond 6' tall male weighing 150 pounds; and a 5'9" or 5'10" male with black curly hair weighing about 160 pounds (Tr. 69-71, 235-236). The Coast Guard officer "almost described [petitioner] to a tee" (Tr. 70).

Given these facts and the remoteness of the area (see Pet. App. A10), it was almost inconceivable that petitioner and his companions were not the three missing crewmen. Hence, the local officers had probable cause to arrest them for possession of narcotics.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

DEBORAH WATSON
Attorney

DECEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20081

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

CASE NO. 85-137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

HENRY LAVADO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

LEON E. SHARPE, P.A.
Leon E. Sharpe, Esquire
4770 Biscayne Blvd.
Suite 970
Miami, Florida 33137
Telephone: (305) 573-3823

Counsel for the Petitioner

BEST AVAILABLE COPY

13

QUESTIONS PRESENTED FOR REVIEW

Whether the detention of Defendant Henry Lavado by local law enforcement officers for over an hour without conducting any interrogation or request for identification while awaiting the arrival of federal drug enforcement agents amounted to an unlawful arrest; and whether the evidence and statements obtained following the arrival of the federal drug agents and the subsequent arrest of the Defendant were the fruit of an unlawful arrest.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Argument	2
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Taglianetti v. United States, 349 U.S. 316 (1969) 2

Rice v. Sioux City Memorial Park Cemetry, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed, 897 (1955) 2

Stone v. Powell, 428 U.S. 465 (1976) 2, 3

United States v. Sharpe, ____ U.S. ____, 105 S.Ct. 1568 1985 5

Wong Sun v. United States, 371 U.S. 471 (1963) 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-137

HENRY LAVADO, Petitioner

v.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari to
the United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 750 F.2d 1527.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's conviction was entered on January 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

POINT I

Argument

Although this petition for certiorari was not filed within the time allowed by the Rules of Court, the time limitation is not jurisdictional and does not serve as a bar to this Court's exercise of discretion to consider this case. Taglianetti v. United States, 349 U.S. 316 (1969).

This Court's discretionary review on certiorari is appropriate in cases involving substantial federal questions reaching constitutional dimensions. Rice v. Sioux City Memorial Park Cemetry, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955). The instant case presents such substantial federal questions reaching constitutional dimensions.

The government's reliance on Stone v. Powell, 428 U.S. 465 (1976) is inapposite

to this Court's determination of whether to exercise its power to review this matter on certiorari. Stone v. Powell, supra, involved habeas corpus proceedings wherein the Court held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the grounds that evidence obtained in an unconstitutional search or seizure was introduced at trial.

POINT II

THE LENGTHY DETENTION OF DEFENDANT BY LOCAL OFFICIALS PENDING ARRIVAL OF CUSTOMS AGENTS WAS AN ILLEGAL ARREST

The essence of the government's first argument is that it was proper for the local officers to detain the defendant for

over an hour awaiting the arrival of more knowledgeable customs agents because "the police" were "diligently pursuing a means of investigation that is likely to resolve the matter in a reasonable period of time." However, the record in this case reveals that both the local officials and the customs agents failed to act diligently.

After receiving a telephone call from the director of a Rookery Bay Laboratory, it took the local officials 15 minutes to arrive at the laboratory where the Defendant was located. (Tr. 464). Upon arrival, the local officials simply walked the Defendant outside the laboratory and had him sit down against the building (Tr. 465). They made no attempt to request information about his identity, to place him under arrest or do anything to acti-

vely investigate the alleged crime for which he was being detained. (Tr. 26).

Upon receiving the call from the director of the Rookery Bay Laboratory, the local agents called the federal drug agents who were thirty minutes away. (Tr. 26). Yet, the federal drug agents arrived at the laboratory over an hour later. Hence, from the time that the federal drug agents were first notified of the defendant's location, it took them an hour and fifteen (75 minutes) minutes to make a 30 minute trip. The lengthy delay indicates a lack of diligence by the various law enforcement personnel in pursuing the investigation; therefore, the one hour detention in this case does not comport with the requirements of United States v. Sharpe, _____ U.S. _____, 105 S.Ct. 1568 (1985).

Next, the government contends that there is no causal connection here between the actions of the local officers, even if illegal, and the discovery of the evidence; therefore, the evidence could not be the fruit of an illegal detention. In the instant case, it is clear that the defendant could have physically walked away from the Rookery Bay Laboratory if he were not being detained by the local officials (Tr. 52). Therefore, it is clear that but for the illegal arrest the evidence submitted at trial from the Defendant's wallet would not have been available to the government. Therefore, the evidence should have been suppressed as the fruit of an illegal arrest. Wong Sun v. United States, 371 U.S. 471 (1963).

Finally, for the reasons stated in the Petition for Writ of Certiorari, and in

accordance with the finding of the court of appeals, the local officers did not have probable cause to arrest petitioner when they arrived at the laboratory. (See Pet. App. A18). Petitioner relies on his prior argument in this regard.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LEON E. SHARPE, P.A.
4770 Biscayne Blvd.
Suite 970
Miami, Florida

By Leon E. Sharpe
LEON E. SHARPE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply Brief have been served by United States Mail this 20th day of December, 1985, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, and a copy upon William Harris, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130.

Leon E. Sharpe

LEON E. SHARPE, ESQUIRE

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

JAN 10 PAGE 11 6

ORIGINAL

No. 85-137 (4)

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RECEIVED
JAN - 8 1986
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HENRY LAVADO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

HENRY LAVADO, JR., in pro se
P.O. Box 518—061
Zephyrhills, Florida 34283

7-F

QUESTION PRESENTED FOR REVEEW

Whether the detention of Defendant Henry Lavado by local law enforcement officers for over an hour without conducting any interrogation or request for identification, while awaiting the arrival of federal drug enforcement agents amounted to an unlawful arrest; and whether the evidence and statements obtained following the arrival of the federal drug agents and the subsequent arrest of the Defendant were the fruit of an unlawfel arrest.

STATEMENT CONCERNING CITATIONS,
AUTHORITY AND THE LAW

The Petitioner, Henry Lavado, Jr., in pro se, submits to The Court that he is not trained in the law and does not know the Rules of The Court.

The Petitioner submits that he is presently incarceratee at Zephyrhills Correctional Institution, a state prison. Zephyrhills Correctional Institution does not have a law library, law clerks or the tools necessary to research and locate the law.

The Petitioner contends that he is sequestered from the law and is unable to change his situation without a punitive transfer to a distant and hostill institution.

Therefore, the Petitioner is unable to cite authority or the law.

JURISDICTION

The Petitioner was convicted of possession of marijuana with intent to distribute and conspiricy to possess with intent to distribute, in the United States District Court, Southern District, February 22, 1983.

The Petitioner was appointed counsel for purposes of appeal and an appeal was held in the United States Court of Appeals, Eleventh Circuit. The Court of appeals affirmed the Petitioner's conviction January 24, 1985.

The Petitioner's court appointed counsel agreed to seek a rehearing of the Eleventh Circuit Court of Appeals' decision or file a petition for writ of certiorari with the United States Supreme Court, February 1, 1985. The Petitioner submits that his court appointed counsel has failed to seek a rehearing of the Eleventh Circuit Court of Appeals' decision and has further failed to timely file a petition for writ of certiorari with the United States Supreme Court.

The Petitioner submits that he has done everything in his power to seek review of his conviction and that he is not responsiable for the untimeliness of his court appointed counsel. The Petitioner contends that he should not be denied a hearing of his petition

for writ of certiorari simply because his court appointed counsel has failed to timely file the petition.

Therefore, the Petitioner respectfully requests that The Court exercise its discretionary power and hear the Petitioner's petition for writ of certiorari.

STATEMENT OF THE FACTS

The Petitioner, while visiting friends, left Cape Romano in a small boat and went to the first island north of Cape Romano. At that point the Petitioner wondered off and got lost. (Tr. 452)

On August 28, 1982, at approximately 10:00 A.M., the Petitioner, seeking help, whistled at least twice to flag down a civilian on Sand Hill, a sand dune abour two miles from the beach. (Tr. 449)

The civilan, a biologist, agreed to help the Petitioner and took him to the Rookery Bay Marine Laboratory, approximately six miles south of Sand Hill. (Tr. 4[illegible] while at the laboratory, the Petitioner called Key West and requested assistance. (Tr. [illegible]-460)

Shortly after the Petitioner called Key West for assistence, at least four Collier County Sheriff's officers and one Marine Patrol officer arrived at the marine laboratory and blocked off the boat exit. (Tr. 100, 124, 446)

At that point in time the Petitioner was removed from inside the marine laboratory by the Collier County Sheriff's officers, placed outside the building and made to sit on the ground against the building wall. (Tr. 27, 99, 112, 114, 125-126) The Petitioner was not free to leave. (Tr. 100, 114, 125-127, 132, 503, 571) The Collier County Sheriff's officers kept the Petitioner seated on the ground for approximately one hour and did not conduct ay investigation whatsoever. (Tr. 26) The Collier County Sheriff's officers did not testify at the supression hearing or at trial. (Tr. 581-582)

After the Petitioner had been seated on the ground for approximately one hour, Agents of The Vice Presidential Task Force (refered to as customs agents throughout these proceedings arrived at the Rookery Bay Marine Laboratory and officially arrested the Petitioner. (Tr. 97, 99, 565)

The Petitioner did not hand over his wallet in response to a request for identification. (Tr. 103, 115, 118, 129) The Petitioner's wallet was obtained as the result of a post-arrest search. (Tr. 156)

Before trial, the Petitioner requested a supression hearing concerning statements and evidence obtained as a result of his arrest. The trial court denied the Petitioner's motion to supress. (Tr. 156)

ARGUMENT

The Eleventh Circuit Court of Appeals errored in applying U.S. v. Moore, 638 F.2d 1171 (9th Cir. 1980). The Petitioner, a United States Citizen, was siezed in Collier County, on the west coast of Florida, by four Collier County Sheriff's officers. The Collier County Sheriff's officers did not testify at the Petitioner's supression hearing or trial and there is no record as to why the Collier County Sheriff's officers stoped the Petitioner.

The Petitioner was not subject to a customs search at the boarder as in Moore, supra. The Petitioner was siezed by four Collier County Sheriff's officers at the Rookery Bay Marine Laboratory. The record does not indicate what, if any, information the siezing Collier County Sheriff's had. The Eleventh Circuit Court of Appeals ruled in the case sub judice, that "the most they (county officers) knew was that a vessel had been chased and had been siezed by the Coast Guard in the vicenity and that three males were at large." The Petitioner contends that the Rookery Bay Marine Laboratory in not the functional equival of the border. The four Collier County Sheriff's officers did not possess the necessary eliments in Moore, "continuous surveilance . . . or similar information", such as radar surveillance as in Moore.

The Eleventh Circuit Court of Appeals ruled in the case sub judice, that "the county officers did not have probable cause . . . (b)ut the officers did have reasonable suspicion. The Eleventh Circuit Court also ruled in the case sub judice that "(t)he county officers did not investigate." The Petitioner contends that the Collier County Sheriff's officer's failure to investigate and seek to affirm or dispell their suspicions rendered the sieture of Petitioner a warrantless arrest, absent probable cause and illegal.

The Eleventh Circuit Court of Appeals did not rule concerning the subsequent arrest by Agents of the Vice Presidential Task Force who arrived at the Rookery Bay Marine Laboratory approximately one hour after the Petitioner was siezed by the Collier County Sheriff's officers. Concerning this arrest, the Petitioner submits that it was a warrantless arrest. The Petitioner contends that the Agents of The Vice Presidential Task Force did not possess any more information than the Collier County Sheriff's officers and therefore, according to the Eleventh Circuit Court of Apreals' ruling that the Collier County Sheriff's officers did not have probable cause, the Agents of The Vice Presidential Task Force did not have probable cause either, rendering the Petitioner's subsequent arrest illegal.

The Eleventh Circuit Court of Appeals errored in ruling that the Petitioner "handed over his walled in response to a request for identification." During the supression hearing the trial court ruled concerning this issue. The trial court's rulling is as follows:

> THE COURT: I find that form the totality of the circumstances presented at this hearing on the motion, that they clearly fit the requirements of Cortez, found at 449 U.S. 411, and that the officer acted reasonably and in good faith in making the arrest. Appropriate Miranda warnings were given, prior to any statement sought to be admitted. Even if the wallet was removed after the arrest, I think it was obtained from the defendant Lavado as a result of a permissable postarrest search. (Tr. 156)(emphasis added)

Therefore, the Petitioner contends that the Collier County Sheriff's officers siezed the Petitioner at the Rookery Bay Marine Laboratory without probalbe couse. Althouth there is no direct testimony from the siezing officers, the Eleventh Circuit Court of Appeals has ruled that the siezing Collier County Sheriff's officers did have reasonable suspicion. The record clearly indicates and the Eleventh Circuit Court of Appeals has ruled, that the siezing Collier County Sheriff's officers did not conduct any investigation to affirm or dispell their suspicions. The Petitioner was siezed and held against his will for one hour, without probabe cause, diligent police investigation or exigent circumstances——simply siezed. This siezure amounted to an arrest absent probalbe cause and illegal. Evidence obtained as a result of this illegal arrest should not have been allowed at trial.

The Petitioner's subsequent arrest by Agents of the Vice Presidential Task Force was the result of the initial illegal siezure by the Collier County Sheriff's officers. Furthermore, these Agents did not have any more information than the Collier County Sheriff's officers. The Eleventh Circuit Court of Appeals has ruled that the information possessed by the Collier County Sheriff's officers did not constitute probable cause. The Agents did not possess any more information than the Collier County Sheriff's officers and therefore did not have probable cause. A warrentless arrest by Agents with less than probable cause is an illegal arrest. The fruits of an illegal arrest are inadmisable. The trial court errored in admitting the evidence obtained as a result of an illegal, warrentless siezure and arrest, absent probable cause. The Eleventh Circuit Court of Appeal errored in finding that the trial court correctly admitted the contested evidence.

CONCLUSION

The Petitioner was arrested in violation of the Fourth Amendment's prohibition against unreasonable search ad siezure. Evidence and statements obtained as a result of an illegal arrest were used at trial, over the objections of Petitioner. The use of inadmisable evidence at trial is reversiable error. The trial courts decision to allow the inadmisable evidence is reversiable error. The Eleventh Circuit Court of Appeals' decision affirming the lower court's admission of said evidence is in error.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

Henry Lavado

HENRY LAVADO. in pro se
P.O. Box 518—061
Zephyrhills, Florida 34283

JANUARY 6, 1986